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PUNITIVE DISCHARGE WITH RETIREMENT PAY:

WINDFALL FOR ACCUSEDS OR JUSTICE FOR ALL?

by

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14. ABSTRACT

When a retirement-eligible military member is court-martialed for any offense and is punitively discharged operation of law he forfeits his retirement pay?an amount sometimes over a million dollars. This forfeiture of retirement pay is a collateral consequence of receiving a punitive discharge?it is not a specific punishment imposed by the court-martial sentencing authority, or by the convening authority who approved the court-martial?s action. In some cases the loss of retirement pay is appropriate and reasonable; in other cases it is harsh and inappropriately severe. It is my thesis that the court-martial members and the convening authority, and not the operation of law, should deprive a member of his retirement pay. This paper explores the implications of a new punishment termed a ?Punitive Discharge with Retirement Pay,? or PD&R for short. The PD&R would be a new punishment authorized at the trial of a retirementeligible military member. The court members would be instructed that if they sentence the accused to a PD&R he would be punitively discharged from service with the loss of all military benefits except retirement pay. The members would also be instructed that they are free to adjudge a traditional punitive discharge that carries with it the loss of retirement pay. Thus, the sentence adjudged would directly take into account whether the accused should be required to forfeit his retirement pay as an aspect of the punishment, rather than leaving the determination to the collateral operation of law. It is my contention that the adoption of the PD&R as a punishment option would be consistent with the maintenance and preservation of good order and discipline in the armed forces, as well as serve the ends of justice. To prove my point, I analyzed both the current military justice system and the current retirement system, and then analyzed what impact the PD&R would have on both systems if it were adopted. I used the notion of maintenance and preservation of good order and discipline in the armed forces as the litmus test of acceptability of the PD&R. In other words, if the PD&R had either a positive or neutral effect on good order and discipline, and a positive or neutral effect on military retirement, it should be adopted. I concluded that the PD&R would have a beneficial effect on the maintenance and preservation of good order and discipline, and a neutral effect on military retirement. Because the PD&R would enhance good order and discipline, I concluded that it should be adopted. I note in my paper that the military retirement system is a statutory system and would require congressional legislation to enact the PD&R, and the changes to the Manual For Courts-Martial would require an Executive Order to implement. The proper administration of military justice requires a delicate balance between the needs of good order and discipline and the needs and rights of the accused. The PD&R discharge would enable the system to make finer distinctions in the sentencing process, enhancing justice and fairness in the armed forces.

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Preface

In 1994, I was a defense counsel in the case of *United States v. Sumrall*. Capt Sumrall was a prior-enlisted captain with 21 years of service in the Air Force. The offenses that he pleaded guilty to were serious, and he was sentenced to confinement and a punitive discharge. Due to the nature of the offenses he committed, many would say neither punishment was inappropriate. However, as a result of the punitive discharge, he forfeited his retirement pay—at that time, almost $750,000. The judge did not sentence him to forfeit his retirement pay, and neither did the convening authority. Rather, the forfeiture was termed a "collateral consequence" of the punitive discharge, and outside the control of the military justice system. Capt Sumrall had a non-working wife and six children, ranging in age from near-college to a toddler. It was not easy explaining "collateral consequences" to that family.

Capt Sumrall appealed the loss of his retirement pay. Judge Sullivan, acting chief judge at the time, wrote the opinion for the court. He said that the statutes that caused Capt Sumrall to lose his retirement pay were outside the control of the military justice system, and that his punishment was legal in the eyes of the law. However, he also published an appendix to the opinion that called for the adoption of a new punishment that would permit the punitive discharge of a retirement-eligible member without incurring the loss of retirement pay.

Each year, the Air Force prosecutes about 35 retirement-eligible members, 15 of who eventually receive a punitive discharge at trial. While the overall numbers are not significant, the people behind those numbers are. During my tenure as a trial and defense counsel, I've prosecuted or defended four of those individuals. The military justice system owes it to its members to ensure that justice is done in all cases. Each military member facing a court-martial deserves to be punished for the offenses that he committed. Sometimes, a punitive discharge with loss of retirement pay is the entirely appropriate result at trial. Sometimes it is not. I decided to write this paper because I've always believed the determination of whether a member ought to forfeit his retirement pay should be left to the wise discretion of the sentencing authority and the convening authority, not to vague notions of "collateral consequences."

I'd like to thank a number of people who have assisted, directly and indirectly in the writing of his paper. First, I'd like to thank Maj John Reese, a Civil War historian by trade who was intrigued enough by the subject of this paper to volunteer to be my research advisor. Thanks for your support. I'd next like to thank Capt Kirk Obear, one of my former colleagues at Scott Air Force Base who helped me ferret out some of the more arcane statistics used in this paper. I'd also like to thank Majors Glenn Farrar, Jose Mata, and Lt Commander Chris Pendleton who endured numerous discussions of military justice, and helped me crystallize many of the ideas covered in this paper. Finally, I'd like to thank my wife Nancy, who has endured interminable discussions about this paper. Thank you.

Abstract

When a retirement-eligible military member is court-martialed for any offense and is punitively discharged operation of law he forfeits his retirement pay—an amount sometimes over a million dollars. This forfeiture of retirement pay is a collateral consequence of receiving a punitive discharge—it is not a specific punishment imposed by the court-martial sentencing authority, or by the convening authority who approved the court-martial's action. In some cases the loss of retirement pay is appropriate and reasonable; in other cases it is harsh and inappropriately severe. It is my thesis that the court-martial members and the convening authority, and not the operation of law, should deprive a member of his retirement pay. This paper explores the implications of a new punishment termed a "Punitive Discharge with Retirement Pay," or PD&R for short.

The PD&R would be a new punishment authorized at the trial of a retirement-eligible military member. The court members would be instructed that if they sentence the accused to a PD&R he would be punitively discharged from service with the loss of all military benefits except retirement pay. The members would also be instructed that they are free to adjudge a traditional punitive discharge that carries with it the loss of retirement pay. Thus, the sentence adjudged would directly take into account whether the accused should be required to forfeit his retirement pay as an aspect of the punishment, rather than leaving the determination to the collateral operation of law.

It is my contention that the adoption of the PD&R as a punishment option would be consistent with the maintenance and preservation of good order and discipline in the armed forces, as well as serve the ends of justice. To prove my point, I analyzed both the current military justice system and the current retirement system, and then analyzed what impact the PD&R would have on both systems if it were adopted. I used the notion of maintenance and preservation of good order and discipline in the armed forces as the litmus test of acceptability of the PD&R. In other words, if the PD&R had either a positive or neutral effect on good order and discipline, and a positive or neutral effect on military retirement, it should be adopted.

I concluded that the PD&R would have a beneficial effect on the maintenance and preservation of good order and discipline, and a neutral effect on military retirement. Because the PD&R would enhance good order and discipline, I concluded that it should be adopted. I note in my paper that the military retirement system is a statutory system and would require congressional legislation to enact the PD&R, and the changes to the Manual For Courts-Martial would require an Executive Order to implement.

The proper administration of military justice requires a delicate balance between the needs of good order and discipline and the needs and rights of the accused. The PD&R discharge would enable the system to make finer distinctions in the sentencing process, enhancing justice and fairness in the armed forces.

Chapter 1

Is There a Problem?

Ius est ars boni et aequi. (Justice is the art of the good and the fair).

—Legal Maxim.

When a retirement-eligible military member is court-martialed for any offense and is punitively discharged, by operation of law he forfeits his retirement pay—an amount sometimes over a million dollars. This forfeiture of retirement pay is a collateral consequence of receiving a punitive discharge—it is not a specific punishment imposed by the court-martial sentencing authority, or by the convening authority who approved the court-martial's action. In some cases the loss of retirement pay is appropriate and reasonable; in other cases it is harsh and inappropriately severe. My thesis is that the court-martial members and the convening authority, not the operation of law, should deprive a member of his retirement pay. This paper explores the implications of one such proposal to grant the court-martial and the convening authority the power to determine whether a particular member ought to forfeit his retirement pay

In *United States v. Sumrall*,[1] the Court of Appeals for the Armed Forces (CAAF) considered the appeal of a retirement-eligible Air Force captain who was dismissed from the Air Force and forfeited his retirement pay. The court considered whether the automatic forfeiture of retirement pay was cruel and unusual, whether it constituted an excessive fine, and whether it violated the Due Process Clause of the Constitution.[2]

Judge Sullivan, writing for the court, denied relief stating that forfeiture of retirement pay, albeit a severe punishment, was not an unconstitutional punishment.[3] However, in an appendix to the opinion, Judge Sullivan published a dissenting opinion he wrote for another case. In it, he wrote, "I respectfully dissent from the law I must apply in this case, and I hope my dissent will call attention to what I perceive as a flaw in our system of justice and suggest a remedy to this flaw."[4]

The other case concerned a Desert Storm veteran with 15 years experience who was being separated under the VSI/SSB program[5] and was to receive separation pay of over $200,000. However, prior to his separation, he used marijuana at a party, and later tested positive in a random urinalysis. He was court-martialed and sentenced to confinement for two months, forfeiture of $700 pay per month for two months, reduction to E-3, and a Bad Conduct Discharge. The Bad Conduct Discharge carried with it the automatic loss of his $200,000 in separation pay.[6]

Judge Sullivan noted, "I doubt there is any jurisdiction in America outside of the military where a first-time offender, who takes several puffs of a marijuana cigarette, is punished by 60 days in jail and a fine of over $200,000."[7] The judge noted that there are only five general punishments available in a military court-martial: Death, (in rare cases); confinement; loss of rank; monetary loss (fine or forfeiture of pay); and a punitive discharge from the service. Judge Sullivan suggested that a new option be added to the list of possible punishments that a court-martial may consider—a discharge with no loss of retirement benefits.[8] For the purposes of this paper, I will refer to the new punishment as "Punitive Discharge with Retirement," or PD&R for short.

Judge Sullivan's proposal would actually require two changes be made to the present system. The first would modify the Uniform Code of Military Justice (UCMJ) to provide for a new punishment—"Punitive Discharge with Retirement Pay."[9] A second change would have to be made to the military retirement system, creating a separate class of retiree ("Payment-Only"). This type of retirement would permit an individual with a punitive discharge to receive retirement pay, but would prevent him from ever being recalled to active duty or receiving the military benefits associated with retirement.[10]

The purpose of this paper is to analyze those two changes to the system, and consider the implications they have for the administration of justice in the military. First, I will discuss the present military justice system and explain the various checks and balances already in place. Next, I will examine the current nature of retirement in the military. It is important to have a solid understanding of the purpose and effect of military retirement before one can consider a proposal that could fundamentally alter the nature of military retirement. After examining the present systems, I will examine the effects on those systems if the PD&R were implemented. Finally, I will make my own recommendation concerning this very important proposal.

The current military justice system is a complicated and interrelated system of administrative, non-judicial, and judicial dispositions of misconduct by military members.[11] I will explore the present military justice system using the hypothetical case of Lt Col Hardwick.[12] In 1996, Lt Col Hardwick had served 22 honorable years in the United States Air Force. During his career, he had served in Operation Urgent Fury in Panama and in Operation Desert Storm, where he received the Distinguished Flying

Cross. He has a wife and two children. His older child was a sophomore in college, and his younger child was a senior in high school actively looking at colleges.

Two years earlier, he was looking forward to retirement, and wanted to settle the family close to home, so he took a job as the Chief of Safety at Baxter Air Force Base. About a year ago, things had begun to sour between him and his wife, and they separated but did not divorce. A short time later, a new airman was assigned to the safety office. Airman First Class Mona Clapton had just graduated technical school at the top of her class. She was a very bright, hard working individual who quickly impressed Lt Col Hardwick. As her supervisor, he spent much time teaching her about the safety office, and she quickly became an indispensable member. Lt Col Hardwick began to rely on her more and more, and over time, developed a romantic interest in her. A1C Clapton was flattered, and returned Lt Col Hardwick's affections. Their romance soon blossomed into a sexual relationship that lasted about three months, and broke off when A1C Clapton found a boyfriend who worked in the Supply Squadron.

Some time later, Lt Col Hardwick finally decided it was time to retire, and he put in his retirement papers. His retirement application was approved. However, about 30 days before he went on terminal leave, agents from the Office of Special Investigations approached him and asked if they could speak with him for a few minutes. They advised him that they suspected him of engaging in an adulterous relationship with A1C Clapton, and also of fraternization. The agents told Lt Col Hardwick that A1C Clapton was bragging to her boyfriend that she had been dating her boss, and her friend was upset and reported the suspected affair. The agents also told Lt Col Hardwick they confronted A1C Clapton, and she admitted to all the necessary details. Lt Col Hardwick was in a state of

shock. He thought if he cooperated, things would go easier on him. After being read his rights, he answered agent's questions, and proceeded to type a ten-page, single-spaced memorandum explaining everything. He included in his statement the fact that he and his wife were separated, and that he was scheduled to retire in another month.

The OSI gave a copy of his confession, A1C Clapton's statement, and the friend's statement to Lt Col Hardwick's commander, Col Gibson, serving as the wing Operations Group Commander, and a copy to the base legal office. Both Col Gibson and the legal office felt that the charges were serious, and that the allegations went right to the heart of military discipline. The commander recommended a trial by court-martial. After the charges were referred to trial, Lt Col Hardwick pleaded guilty, and threw himself on the mercy of the court. After hearing all the evidence, the military judge sentenced Lt Col Hardwick to be dismissed from the service, and to receive a reprimand.

Lt Col Hardwick learned that dismissal from the service meant that he was going to forfeit all his retirement pay—nearly $2500 per month after taxes. This was money on which he was counting to put his children through college, and pay his wife alimony and child support for his son when they eventually got divorced. Over the course of his expected life span, Lt Col Hardwick expected to earn over $1 million in retirement pay. Lt Col Hardwick violated military standards and paid a very severe penalty. In the next section, we will take a closer look at the current military justice system and analyze the different tools commanders have to maintain discipline in their units.

Notes

1. 45 M.J. 207 (1996)
2. *Id.* at 209-210
3. *Id.* at 211.
4. *Id.*

Notes

[5]. Voluntary Separation Incentive/Special Separation Bonus. These programs were an effort to drawdown the force and encourage military members to separate. One program paid members a monthly stipend based on the number of years of service; the other program paid members a lump-sum settlement. Members were free to participate in the program and select the program of their choice.

[6]. *Sumrall* at 211b

[7]. *Id.*

[8]. *Id.*

[9]. UCMJ Article 56, 10 U.S.C. §856.

[10].Army:10 U.S.C. §3911 (Officer members)
10 U.S.C. §3914 (Enlisted members)
Air Force:10 U.S.C. §8911 (Officer members)
10 U.S.C. §8914 (Enlisted members)
Navy:10 U.S.C. §6323 (Officer members)
10 U.S.C. §6330 (Enlisted members)

[11]. By "military justice system," I am referring to the broad range of powers invested in commanders to deal with misconduct, and not only to matters covered by the Uniform Code of Military Justice. However, an understanding of commander authority outside the UCMJ is critical to understanding any proposed change to the UCMJ, because the entire system is delicately balanced, and any changes must be evaluated with respect to their effect on the balance of the overall system.

[12]. This case history is fictional and is included only to elaborate the issues and concepts addressed in this paper. It is based on an amalgamation of real cases, all of which are in the public record.

Chapter 2

Analysis of Current Military Justice System

Fiat justitia ruat coelum (Let justice be done though the heavens may fall).

—Lucius Calpurnius Piso Caesonnius (43 B.C.)

In this section, I will describe and analyze the current military justice system, using the hypothetical case of Lt Col Hardwick to illustrate a number of points. Generally speaking, the military justice system is divided into three categories: administrative, non-judicial, and judicial.[1] Ordinarily, administrative sanctions carry the smallest adverse consequences, and judicial actions are the most serious. However, there is tremendous flexibility within and between the categories, and frequently administrative sanctions are more serious than non-judicial or even judicial sanctions.[2]

Air Force policy is to resolve matters of misconduct at the lowest level possible, consistent with the maintenance of good order and discipline.[3] Of course, the maintenance of good order and disposition may require that the matter be directly disposed of by a General Court-Martial.[4] Additionally, it is important to understand that the military justice system is a commander's program to maintain good order and discipline in the armed forces. The military justice system is unique in that military commanders, and not attorneys, decide which cases go to trial and which cases are disposed of through administrative or non-judicial means.[5] The amount of authority a

commander has is based on a combination of that commander's rank and position, and sometimes limited by the rank of the accused.[6]

After reviewing the OSI report and the statements of Lt Col Hardwick and A1C Clapton, the operations group commander, Col Gibson, will have to decide what action to take. In making his decision, he should consult with the base legal office for guidance.[7] Additionally, Lt Col Hardwick's defense counsel will probably contact the commander and advocate for reduced punishment. Col Gibson should first consider whether administrative action is appropriate. Most forms of administrative action (counseling, reprimands, administrative control) would have no effect whatsoever on Lt Col Hardwick's rank or retirement pay, although they may affect his promotion and career opportunities.[8] Because Lt Col Hardwick is already retirement eligible, he cannot be administratively discharged, the most serious action available in the administrative category.[9]

If, after reviewing the evidence against Lt Col Hardwick, the commander believes that administrative sanctions are inappropriate, he should next consider non-judicial punishment, or Article 15. While the UCMJ permits a colonel to impose non-judicial punishment on a subordinate Lt Colonel, virtually all service regulations administratively withhold the authority of commanders under the rank of O-7 to impose Article 15 punishment on officers of any rank. Therefore, if Col Gibson believes that an Article 15 is the most appropriate disposition, he will have to recommend it to the first general officer in the chain of command. If Lt Col Hardwick were to receive an Article 15, he could be required to forfeit one-half of his base pay per month for two months, and be reprimanded.[10] Unlike enlisted personnel, officers cannot be reduced in rank as the result

of an Article 15.[11] Additionally, the Article 15 could not prevent Lt Col Hardwick from retiring from the service, although it may affect the grade at which he retires, and consequently the amount of retirement pay he draws.[12]

If Col Gibson determines that neither administrative nor non-judicial punishment is appropriate in this case, he could recommend through the chain of command that Lt Col Hardwick be tried by court-martial. Normally, officers going to court are tried by General Courts-Martial, because only a general court-martial has the authority to both confine and punitively discharge an officer.[13] For enlisted members, a Special Court-Martial is roughly equivalent to a misdemeanor trial, and a General Court-Martial is roughly equivalent to a felony trial.[14]

If Col Gibson recommends a General Court-Martial in this case, Lt Col Hardwick's counsel can informally try to persuade the superior commanders in the chain of command to impose administrative or non-judicial punishment instead. If those efforts are unsuccessful, Lt Col Hardwick can try to persuade the Article 32[15] investigating officer that a court-martial is inappropriately severe.[16] Of course, the investigating officer has no independent authority but only makes recommendations to the convening authority. Nonetheless, convening authorities are expected to carefully consider the investigating officer's input. Once the decision has been made to send the case to trial, Lt Col Hardwick has several opportunities to preserve his retirement. The first is to request retirement in lieu of trial by court-martial.[17] This is a formal request to the Secretary of the accused's service that he be retired without facing trial. While only the Secretary of the Air Force can approve Lt Col Hardwick's request, both the numbered air force commander and the MAJCOM commander can disapprove the request, without the

request ever reaching the Secretary.[18] The second option Lt Col Hardwick has is to enter into a pretrial agreement (PTA) with the convening authority in which, in return for the accused's plea of guilty, the convening authority agrees to disapprove a punitive discharge if one is adjudged at trial.[19] If such a PTA were entered into, Lt Col Hardwick could not be punitively discharged, and hence would not have to forfeit all his retirement pay. However, such a PTA would not limit the Secretary's authority to conduct a grade determination (see discussion, *infra*).

If Lt Col Hardwick's efforts to avoid trial are rebuffed, he will have to proceed to trial. There, he can try to convince the sentencing authority (either a judge or court-members) to not impose a punitive discharge as an element of his sentence. If the sentencing authority adjudges a punitive discharge as an element in Lt Col Hardwick's sentence, then he can request clemency from the convening authority.[20] The clemency process gives Lt Col Hardwick the right to present matters for the convening authority to consider, and the convening authority has the power to disapprove or mitigate the punishment the court-martial imposed. Therefore, even at this stage, Lt Col Hardwick could still be given the right to retire.

Lt Col Hardwick can appeal his sentence to the Air Force Court of Criminal Appeals (AFCCA).[21] If the AFCCA agrees that some error was made in the court-martial, it could vacate the sentence and require a retrial, or it could unilaterally impose a new sentence, perhaps one not including a Dismissal. After the AFCCA reviews his appeal, Lt Col Hardwick could petition the Court of Appeals of the Armed Forces (CAAF) to consider his appeal.[22] If the CAAF agrees to hear his appeal, and it finds error, it can vacate the sentence and return it to either AFCCA for further action or to the base for re-

sentencing.[23] Also, if the CAAF hears an appeal, the accused has an opportunity to petition the U.S. Supreme Court for a writ of certiorari.[24]

Finally, the Secretary of the Air Force is required to execute all officer punitive discharges (Dismissals).[25] Lt Col Hardwick could appeal to the Secretary to substitute a retirement in lieu of a punitive discharge, even at that late stage of the proceedings.[26]

The current military justice system places great emphasis on process and procedural fairness at all stages of action. There are a number of due process protections in place for the retirement-eligible member accused of misconduct. The member's commander has numerous opportunities to resolve the matter without going to court. Additionally, even if the matter does go to court, the accused can offer to retire in lieu of trial, or enter into a pretrial agreement with the convening authority to avoid a punitive discharge. Finally, if the member goes to trial and is given a punitive discharge, he can request clemency from the convening authority, appeal his sentence through the military appellate system, and even petition the Secretary of the Air Force for clemency before he or she executes the Dismissal. The imposition of a punitive discharge for a military accused is neither arbitrary nor capricious but rather the result of a complicated process that balances the needs of good order and discipline against the needs and rights of the accused.

In the next section, we will take a look at the other blade of the scissors, the military retirement system. In that section we will explore the history of military retirement, and observe the changes it has undergone over the years, all with an eye to considering whether the PD&R is incompatible with military retirement.

Notes

[1]. See *The Military Criminal Justice*, 4th Edition, David A. Schleuter, Section 1-8, page 40 (1996).

Notes

[2.] An administrative discharge is an administrative sanction that can be far more serious than an Article 15 administered by a company-grade officer. An Article 15 can be more serious than a court-martial (Sgt Major McKinney of the Army could have received more serious punishment through non-judicial punishment than he received at his General Court-Martial).

[3.] R.C.M. 306(b).

[4.] First offender murderers go directly to trial.

[5]. Consider the following examples:

a.Commanders generally prefer charges, although technically, anyone subject to the UCMJ may legally prefer charges (UCMJ Article 30, 10 U.S.C. §830; See also R.C.M. 307(a)).

b.Only designated commanders may refer charges to a court-martial (See UCMJ Articles 22 (GCM), 23 (SPCM), and 24 (SCM). 10 U.S.C. §§822-824.

c.Only the convening authority may conclude a pretrial agreement (R.C.M. 705)

d.Only the convening authority may take action on a case (R.C.M. 1107).

[6.] For more detail, see UCMJ Article 22, 10 U.S.C. §822 (persons authorized to convene a general court-martial); UCMJ Article 23, 10 U.S.C. 823 (persons authorized to convene a special court-martial); and UCMJ Article 24, 10 U.S.C. §824 (persons authorized to convene a summary court-martial). In addition to the statutory authorizations, each year a special order is published specifically designating by position the individuals authorized to convene various types of courts-martials. In the Air Force, general courts-martials may typically be ordered by numbered air force commanders, and AFMC product center commanders. Wing commanders can typically order special courts-martials. Also, consider the rank restrictions associated with the ability to impose Article 15 non-judicial punishment (See UCMJ Article 15, 10 U.S.C. §815; M.C.M. Part V, and AFI 51-202).

[7.] AFIs 51-201 and 202 require commanders to seek legal advice in considering judicial and non-judicial dispositions.

[8.] For example, an administrative reprimand may be placed in an Unfavorable Information File (UIF). See AFI 36-2907. A member's promotion selection RIP indicates whether he has an active UIF, conveying a negative message to a promotion board. Additionally, commanders are authorized to explicitly make an annotation on the member's promotion record that he has either a reprimand or an Article 15 in his records. See AFI 36-2608, paragraphs 2.5 (Article 15) and 2.6 (Letter of Reprimand). Such annotations remain in the member's selection record until his next in-the-zone promotion. *Id.*

[9.] Cite AFI 36-3207, Table 2.2, Note 12.

[10.] See MCM Part V, para 5b.(1)(B).

[11.] *Id.*

[12]. See 10 U.S.C. 1370 and discussion *infra* on the Secretarial authority to conduct grade determinations.

[13.] See R.C.M. 1003(c)(2)(A)(ii) for confinement; R.C.M. 1003(c)(2)(A)(iv) for punitive discharge.

[14.] *Military Criminal Justice*, Fourth Edition, Schleuter, Section 1-8(D) (1996).

Notes

[15]. Article 32, UCMJ, 10 U.S.C. §832. An Article 32 hearing is like a grand jury hearing, where an investigating officer makes a recommendation whether there is sufficient evidence to proceed to trial.

[16]. R.C.M. 405(f)(11), (12). See also R.C.M. 405 (j)(2)(I).

[17]. Requests for retirement in lieu of trial by court-martial are processed in accordance with AFI 36-3203, Chapter 2, table 2.2, rule 15. Non-retirement eligible members may request adminisrative discharge in lieu of trial by court-martial. Enlisted personnel can request a "Chapter 4 Discharge," named after the chapter of the regulation which authorizes it, AFI 36-3208. Although a Chapter 4 discharge may be characterized as Honorable, General Under Honorable Conditions, or Under Other Than Honorable Conditions (UOTHC), virtually all such discharges are characterized as UOTHC. AFI 36-3208, paragraph 1.18. Officers have a similar option. If an officer believes that the preferral of charges is imminent, he can submit a "Request for Resignation for the Good of the Service." See AFI 36-3207, paragraph 2.23. Usually, an officer submits an unconditional resignation, but an officer may submit a conditional resignation. If the officer submits a conditional resignation, either the wing commander or the MAJCOM commander is authorized to disapprove the request and return it to the officer. *Id.* Note that a resignation or discharge to avoid trial by court-martial terminates most military benefits. See 38 C.F.R. 3.12(c)(3).

[18]. AFI 36-3203, Chapter 2, Table 2.2, Rule 15.

[19]. R.C.M. 705(b)(2)(E).

[20]. See UCMJ Article 60 (10 U.S.C. §860). Also, see R.C.M. 1105(b) (submission of matters); R.C.M. 1107(b)(1) (discretion); R.C.M. 1107(c) (findings); and R.C.M. 1107(d) (sentence).

[21]. UCMJ Article 66, 10 U.S.C. §866.

[22]. UCMJ Article 67(a), 10 U.S.C. §867(a).

[23]. UCMJ Article 67(c), (d); 10 U.S.C. §867(c), (d).

[24]. UCMJ Article 67a, 10 U.S.C. §867a. See also 28 U.S.C. 1259. A writ of certiorari is a petition to the Supreme Court to exercise its discretion to hear the case on appeal.

[25]. UCMJ Article 71(b); 10 U.S.C. §871(b).

[26]. *Id.*

Chapter 3

The Military Retirement System: History and Analysis

> *Tempora mutantur, nos et mutamur in illis (Times change, and we change with them too).*
>
> —From Owen's Epigrammata, 1615

It is very important to understand the role the military retirement system plays in the military justice process, for it is the interaction of the retirement system and the military justice system which precludes a punitively discharged member from drawing retirement pay. Nothing in the law *prohibits* a punitively discharged member from receiving retirement pay.[1] Rather, it is the service secretary who denies punitively discharged members their retirement pay.

The military retirement system is not a traditional retirement system. Among some of the significant differences are that military retirees remain subject to the UCMJ and they may be involuntarily brought back on active duty at the direction of the service secretary for continued service in the event of a national mobilization.[2] The present retirement system is based on three sets of intertwined federal statutes, each of which cover a different aspect of military retirement.

The first set of statutes permit the Secretary of the Service to retire officers and enlisted members with more than 20 years of service.[3] The statutes require the officer to request retirement, and states that upon such a request, the Secretary may approve it. Of

course, the Secretary is not required to approve the request; mission needs may be such that it might not be in the best interest of the service to retire a particular member at a particular point.[4] Additionally, this set of statutes shows why military retirements do not "vest" as that term is commonly understood; the Secretary retains the discretion to retire members, and the "right" to retire is not created until the service secretary approves an officer's request to retire.[5]

The second statute covers the Secretary's authority to determine the grade in which a member retirees.[6] The law provides that a member shall be retired in the highest grade in which he served on active duty satisfactorily, as determined by the Secretary of the military department concerned. The Secretary's role in what are commonly called grade determinations is a little known but very important fact for members retiring in the wake of recent misconduct. Currently, the Secretary conducts a grade determination when a member's records indicate that he may not have performed satisfactorily at his current grade. In other words, if a member receives an Article 15 and puts in his retirement paperwork shortly thereafter, a grade determination is required.[7] This is not to say that the member's retirement grade will be reduced, but it must be considered.

Finally, the third statute defines the legal status of retired members, including the Secretary's power to order a retiree to active duty (10 U.S.C. §688a); and the duties of a member called to active duty (10 U.S.C. §688c).[8]

Apart from the statutes directly pertaining to the military retirement system, there are other federal statutes that affect the receipt of military retirement pay. The most important of these provides that any federal retiree (military or civilian) shall forfeit his retirement pay if convicted of one or more of an enumerated list of crimes. The offenses,

which trigger this provision, include treason, rebellion, and insurrection, aiding the enemy, espionage, as well as perjury and subornation of perjury regarding the same. [9].

In addition to understanding the mechanics of how military retirement works, it is important to understand the philosophy underlying the payment of retirement pay to military retirees. This is particularly important because the appeal of adopting the PD&R discharge could well depend on which theory of retirement one adopts. The origins of military retirement began during the Civil War. Prior to this time, there was no provision to retire members of the military, and consequently there were individuals serving not fit to perform their duties.[10] Military retirement was initiated as a force-shaping tool.[11] One of the most important issues to address with respect to military retirement is to consider the very nature of a military retirement. There are two schools of thought on the nature of a military retirement, and they both affect the appropriateness of adopting the PD&R.

The first school of thought is that military retirement is diminished pay for diminished services. They contend that military retirees are still performing current services to the military (presumably maintaining themselves in a state of readiness to be recalled to active duty if required). However, if military pay is reduced compensation for reduced services, the logical implication is that there can be no justification for paying retirement pay to an individual who is punitively discharged, and is thus incapable of performing *any* services or being recalled to active duty.

The U.S. Supreme Court first addressed this issue in the case of *United States v. Tyler*,[12] *Tyler* was a suit brought by retirees to have their pay raised by the same amount paid to members of the active service. When Tyler and others retired, military pay was extremely low, and retirement pay was even lower. In the 1880s, Congress passed a pay

raise for all service members, raising their pay by a factor of three or four or more. When the retirees learned they were not to receive this pay increase, they sued the government claiming they were also members of the service and hence entitled to the pay raise. The court granted their petition, and noted in famous language:

> It is impossible to hold that men who are by statute declared to be part of the Army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed from the service in disgrace, are still *not* in the military service.[13] (Emphasis in original).

In later cases, the courts relied upon the theory that military retirees were part of the force to actually deny them benefits. In *Costello v. United States*, Congress de-coupled retirement pay raises from those for active duty pay raises (the issue presented in *Tyler*). Costello sued under the grounds decided in *Tyler*. The court ruled against Costello, stating that as retired members who are indeed providing current services, Congress is free to change their pay and benefits as it sees fit.

The second school of thought contends that despite language to the contrary, the reality of military retirement is that it is in fact deferred compensation for services previously rendered, like a traditional retirement. If one adopts this view, there is much less controversy in paying punitively discharged members retirement pay, because retirement pay is not based on the retiree providing current "services."

Despite much lip service to the contrary, Congress has explicitly and implicitly changed the nature of a military retirement to such an extent that it is virtually impossible to argue that it is anything other than deferred compensation. The chipping away came after the landmark case *McCarty v. McCarty.*[14] *McCarty* concerned a military member

who was seeking a divorce in California, a community property state. His wife claimed that a portion of his future military retirement pay was community property and subject to division by the court. The husband argued that his retirement would not be deferred compensation, but is current compensation; diminished compensation for diminished services. Under the laws of community property, current income is not divisible, but deferred compensation is. The Supreme Court considered both arguments, and rejected both.[15] Instead, it based its decision on the carefully crafted Congressional scheme of retirement, and held that no state court has jurisdiction to meddle with such a carefully crafted Congressional scheme.[16] The Court was concerned that if retirement pay were subject to division by a state divorce court military recruiting and retention could be adversely affected. Thus, without deciding whether retirement pay was deferred compensation or current compensation, the Court held for the husband.[17] Congress reacted swiftly, and passed the Uniformed Services Former Spouse Protection Act (USFSPA)[18] which explicitly permitted state divorce courts to divide retirement pay. This statute cannot be squared with the notion that military retirement is current compensation; the obvious fact is that individuals are receiving military retirement pay who never served a day in service, are not subject to the UCMJ, and are not eligible to be recalled to active service. In many cases, these nonmilitary spouses are receiving up to one-half of the retirement pay of the retired member.

In a more recent case, *Barker v. Kansas,*[19] the Court considered whether Kansas could tax the retirement pay of military members, but not tax the retirement pay of retired state employees. At issue in that case is the principle that permits a state to tax federal employees' compensation only if the taxation does not discriminate against employees

based on the source of the compensation.[20] Kansas did not tax the retirement pay of state and local government retirees, but did tax military retirees. Kansas argued that its tax was permissible, because the income of state and local government employees was deferred compensation, while the income of military retirees was current diminished compensation. Because the nature of the income was substantially different, Kansas argued that it could tax the income differently. The court rejected the argument, and held in favor of the military retirees. In reaching its decision, the Court noted that military retirees unquestionably remain in the service and are subject to restrictions and recall; and in these respects they differ from other retirees. However, the court went on to state that Kansas may not treat military retirement pay as reduced pay for reduced services. It noted that a military retiree is entitled to a stated percentage of the pay level achieved at retirement, multiplied by the years of creditable service. In this respect,

> Retired military pay bears some of the features of deferred compensation. The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement." By taking into account years of service, the formula used to calculate retirement benefits leaves open the possibility of creating disparities among members of the same pre-retirement rank. Such disparities cannot be explained on the basis of "current pay for current services," since presumably retirees subject to these benefit differentials would be performing the same services.[21]

Additionally, Congress does not consider military retirement pay to be "earned compensation," because it cannot be considered toward making a contribution toward an Individual Retirement Account.[22] Finally, Congress de-coupled the requirement that able-bodied retired members be eligible for recall to active duty. In 1997, Congress amended the retirement law to provide that SERB'd officers[23] are not eligible for recall to active duty.[24] Clearly, the purpose behind the law was to prevent them from subverting

the purpose behind the SERB retirement, but if those officers are ineligible for recall, what current services can they be providing?

In my view, military retirement pay is deferred compensation for previously rendered services. It can be divided upon divorce, paid to nonmilitary spouses incapable of providing current services; for tax purposes it must be treated like any other retirement, including IRAs, and finally, not all retirees are even eligible to be recalled to active duty. With that as background, there is no principled reason that military members punitively discharged should be ineligible from drawing retirement pay, notwithstanding their ineligibility to ever serve again.

So far, we've considered the military justice system and the military retirement system. We have seen that while the PD&R would not inconsistent with either system, we have not considered whether the adoption of the PD&R would improve the administration of military justice. That issue is the subject of the next two chapters. First, we will consider the dynamic forces and pressures built into the system that caused Judge Sullivan to propose the PD&R in the first place. Once we understand the root cause of the problems, we will next consider whether adopting the PD&R will solve those problems. In the subsequent chapter, we will address whether the PD&R will have a positive or negative impact on the maintenance and preservation of good order and discipline, the *sine qua non* of military justice.

Notes

[1] *Sumrall*, 45 M.J. at 211; 10 U.S.C. §8911.
[2.] 10 U.S.C. §688.
[3.] 10 U.S.C. §§3911, 3914 (Army); §§ 6323, 6330 (Navy); §§8911, 8914 (Air Force).
[4.] AFI 36-3203, Chapters 2, 3.
[5.] AFI 36-3203, Table 3.1
[6.] 10 U.S.C. 1370.

Notes

[7]. 36-3203, paragraph 7.5.

[8]. Members recalled to active duty may be assigned to such duties as the Secretary considers necessary in the interest of national defense. 10 U.S.C. §688(c).

[9] 5 U.S.C. §8312

[10]. *See* Cong.Globe, 37th Cong., 1st Sess., 16 (1861) (remarks of Sen Grimes) ("some of the commanders of regiments in the regular service are utterly incapacitated for the performance of their duty, and they ought to be retired upon some terms, and efficient men placed in their stead"); *id.* at 159 (remarks of Sen Wilson) ("We have colonels, lieutenant colonels and majors in the Army, old men, worn out by exposure in the service, who cannot perform their duties; men who ought to be honorably retired, and receive the compensation provided for in this measure"). *See McCarty v. McCarty*, 453 U.S. 210 at fn. 2.

[11]. *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981).

[12]. 105 U.S. 244, 26 L.Ed. 985 (1882)

[13]. 105 U.S. at 246.

[14]. 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981)

[15]. 453 U.S. 233; 101 S.Ct. 2741.

[16]. 453 U.S. 236; 101 S.Ct. 2743.

[17]. *Id.*

[18]. 10 U.S.C. §1408.

[19]. 112 S.Ct. 1619 (1992)

[20]. 112 S.Ct. at 1623.

[21].*Id.*

[22]. 26 U.S.C. §219(f)(1).

[23] Selective Early Retirement Board (SERB). A "SERB'd" officer is one who met such a board and was required to submit his retirement pay before he reached his "high year of tenure," the point at which he must require by operation of law.

[24]. 10 U.S.C. 688(d)(2).

Chapter 4

The Sentencing Process: Tensions in the System

> *My object all sublime I shall achieve in time—To make the punishment fit the crime.*
>
> —Sir William Schwenck Gilbert, *The Mikado*, 1885

Having considered the military justice system and the military retirement system, it is time to take a closer look at the PD&R discharge, including the dynamic forces that caused Judge Sullivan to recommend this new option in the first place. As he recognized in his memorandum, the root cause is that the current sentencing options do not permit sufficient flexibility for the sentencing authority to impose an appropriate sentence in all cases.[1] The military recognizes five purposes or principles of punishment.[2] The military judge instructs members serving as a court-martial on these before imposing punishment.[3] They are: (1) Rehabilitation of the wrongdoer; (2) punishment of the wrongdoer; (3) protection of society from the wrongdoer; (4) deterrence of the wrongdoer and those who know of his or her crimes from committing the same or similar offenses; and (5) preservation of good order and discipline in the military.

Currently, the range of punishments available in a military court-martial are as follows, listed in approximate order from least severe to most severe: no punishment, reprimand, restriction, reduction in grade (enlisted only), hard labor without confinement (enlisted only), forfeiture of pay (and allowances), fine, confinement, punitive discharge,

death, or any combination of the foregoing.[4] For the typical retirement-eligible accused, frequently an officer in the grade of O-5 or higher; or an enlisted member E-7 or higher, some of the punishments might be inappropriate, and may even be impermissible.[5]

Let us recall our hypothetical case of Lt Col Hardwick. While it may be a very appropriate punishment to reduce him in grade, it is not authorized.[6] Hard labor without confinement is also not authorized for officers.[7] Moreover, it is difficult to envision a court sentencing a senior NCO to perform hard labor without confinement. This punishment is typically given to lower-ranking enlisted members.

Forfeiture of pay and allowances would seem to be an effective punishment at first blush, but there are several technicalities that make it an ineffective punishment for the retirement-eligible accused. First, forfeitures only affect pay as it accrues.[8] Therefore, one must remain on active duty in order to forfeit pay, leaving the member and the military in the awkward position of retaining a member on active duty for the sole purpose of requiring him to forfeit pay. Second, the law only permits a maximum forfeiture of two-thirds pay if the member is not in confinement. Consequently, the only time forfeitures are a truly effective punishment is when the member is confined.[9]

A fine is a potential middle ground between too much punishment and too little punishment. A military fine creates a debt immediately payable to the government of the United States.[10] Considering the case of Lt Col Hardwick, if the expected future value of his retirement were to be $1 million[11] a fine of $100,000 might well be considered eminently fair—only ten percent of the expected value of his retirement.[12] However, Lt Col Hardwick's retirement would be paid over the course of his lifetime, and the fine is a debt that becomes due immediately. Depending on Lt Col Hardwick's financial situation,

immediate payment of the debt may not be possible.[13] Because of the obvious implications of imposing a $100,000 fine on a Lt Col, this option, while viable does not resolve the matter of determining an appropriate punishment.[14]

One form of punishment authorized in virtually all proceedings is confinement.[15] However, while confinement may be authorized, it is not always appropriate. The primary purpose for confinement is the protection of society from the wrongdoer.[16] At the same time, some of the offenses that land retirement-eligible accused's in court are not the type of offenses for which confinement is normally appropriate, especially when more senior members are accused. It is extremely unlikely that Lt Col Hardwick would be confined for even one-day confinement, although his offenses carry a maximum punishment of three years confinement.[17]

Two remaining punishments are sentences to "No Punishment" and a sentence to receive a reprimand.[18] Sentences of "no punishment" are extremely rare and usually reserved for technical reasons.[19] Reprimands are sometimes given in conjunction with other punishments, but rarely as a stand-alone punishment because they are generally viewed as being less punishment than is appropriate in most cases.

The final authorized punishment is a punitive discharge. There are actually three types of punitive discharges, a Bad Conduct Discharge; a Dishonorable Discharge; and a Dismissal.[20] The Bad Conduct Discharge and the Dishonorable Discharge are reserved for enlisted personnel, and the Dismissal is the only punitive discharge authorized for an officer.[21] Notwithstanding the attempted distinctions,[22] the legal effects of all three discharges are basically the same, and for the purposes of this essay, all three discharges equally terminate a member's right to receive retirement pay.[23] The difficulty court-

members face in adjudging an appropriate sentence is that while the punitive discharge can have harsh collateral consequences (more on this shortly), it is the only means the members have to discharge a member from the service.[24] There are instances where court-members may arrive at a point where the two punishments being actively considered are confinement or a discharge. They may believe that confinement is not appropriate, but a punitive discharge, at least in a general sense, is appropriate. However, whether the court-members considering a punitive discharge realize that it is tantamount to the member forfeiting his retirement pay is somewhat of a problematic question that the military courts are now in the process of trying to resolve.

At issue is the so-called "collateral consequences" rule.[25] Traditionally, the collateral consequences rule provided that only matters which arise directly out of the imposition of a sentence could be considered in either arguing for or against a particular punishment, or be considered by the sentencing authority in imposing punishment.[26] For example, counsel could argue that confinement would take away the accused's liberty, but could not argue that as a result of confinement the accused might lose his medical license. The purpose for the rule is to minimize or eliminate speculation from the sentencing process. We *know* that confinement will take away the accused's freedom; we do not *know* that confinement will cause the accused to lose his medical license. The loss of the medical license is collateral to the sentence imposed.[27] Unfortunately, the collateral consequences rule has been invoked in courts-martial to prevent the accused from explaining to the court-members that a punitive discharge could cost him his retirement and retirement pay.[28]

In 1989, in the case of *United States v. Henderson*,[29] the court held for the first time that retirement-eligible accused's could introduce evidence of loss of retired pay on the issue of whether they should be punitively discharged. The trial courts strictly construed *Henderson*, not allowing members who are not actually retirement eligible to put on such evidence.[30] Recently, in a trio of cases,[31] the Court of Appeals of the Armed Forces loosened the collateral consequences rule, now permitting members "perilously close" to retirement to put forth evidence concerning the potential loss of retired pay. The court did not specify how close to retirement "perilously close" was, and requested the services address this matter through a regulation or instruction.[32]

Therefore, under today's law, Lt Col Hardwick could introduce evidence concerning his loss of retirement pay. While this does permit the court-members to unambiguously understand the consequences of giving Lt Col Hardwick a punitive discharge, it is still insufficient. It does nothing to correct the real issue—giving the members a sentencing option less serious than a full punitive discharge, but more serious than a reprimand, possibly un-collectible fine, and/or inappropriate confinement.

Judge Sullivan's PD&R proposal is a proposal only to give court members an additional sentencing option; in no way would it eliminate the members' ability to impose a full punitive discharge if they deem it appropriate. The full range of sentencing options currently available would remain available, with one additional option. The PD&R would provide the sentencing authority with needed flexibility to make the fine distinctions often required to craft an appropriate sentence. Next, we will consider what effect the adoption of the PD&R might have on the maintenance and preservation of good order and discipline in the armed forces.

Notes

[1]. *Sumrall*, 45 M.J. at 211B.

[2]. See R.C.M. 1001(g) and DA Pamphlet 27-9, Chapter 2, p. 64 (1996).

[3]. *Id.*

[4]. R.C.M. 1003(b).

[5]. Of course, this discussion is limited to those offenses like the one discussed in the hypothetical of Lt Col Hardwick; certain serious offenses require the full range of authorized punishments, notwithstanding the rank or position of the accused.

[6]. R.C.M. 1003(c)(2)(A)(i).

[7]. R.C.M. 1003(c)(2)(A)(i).

[8]. R.C.M. 1003(c)(2)(A)(iii).

[9]. A recent change to the UCMJ took away a much of the previous discretion the sentencing authority had in balancing forfeitures and confinement. UCMJ Article 58b; 10 U.S.C. §858b. Previously, confinement and forfeiture were totally separate punishments, and neither included the other (except that forfeitures without confinement were limited to two-thirds of base pay). Therefore, it was possible for a member to be confined for several years but not be required to forfeit pay. This would typically be the case where the sentencing authority was seeking to punish the accused but leave his family financially solvent. In some cases, convening authorities conditioned clemency or pretrial agreements on the accused establishing an allotment for his pay to go to the family. The new changes to the UCMJ eliminate this flexibility, and now provide that an accused who is sentenced to more than six months confinement, or any confinement coupled with a punitive discharge, automatically forfeits his pay within two weeks of the announcement of sentence. UCMJ Article 57a(1). In cases of severe financial hardship, the convening authority is permitted to authorize pay and allowances to be paid to the accused's family, but such payments cannot exceed six months. UCMJ Article 58b(b).

[10]. R.C.M. 1003(b)(3). See also discussion associated with that provision.

[11]. If Lt Col Hardwick is 45 years old, and he is expected to live to age 75, then he will receive 360 monthly retirement payments. If his monthly retirement pay is $3000, then he will receive $1,080,000.00. Note that although this calculation does not take into account the effects of inflation (discounted net present value), it also does not take into account the COLA that retirees receive. The closer the COLA matches the inflation rate, the more accurate my calculation is. Exact figures of the value of retirement pay are not important; the understanding that it is a significant amount of money is the only point.

[12]. See the discussion to R.C.M. 1003(b)(3): "A fine is not normally adjudged unless the member was unjustly enriched." Cases where the PD&R discharge would be most likely to be considered are cases where the accused was not unjustly enriched by his misconduct.

[13]. The UCMJ permits the sentencing authority to impose contingent confinement along with a fine. See R.C.M. 1003(b)(3). In other words, Lt Col Hardwick could be fined $90,000, and if the fine is not paid, he could be imprisoned for a period not to exceed the maximum confinement authorized for the offense. However, it is important to recognize that such confinement is not automatic. First, such contingent confinement may not be imposed where the adjudged sentence did not include confinement or where the confinement portion of the sentence has already been completed. See cases collected at *Military Criminal Justice*, 4th Edition, Section 16-3(E) (1996). Second, R.C.M.

1113(d)(3) states that "confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the government's interest in adequate punishment." Of course, such imposition of punishment must first meet the first condition that the accused receives confinement as an initial element of his sentence. Since we've been discussing fines as an alternative to confinement, the procedural rules concerning fine enforcement highlight the real limitations of using fines as an alternative to confinement.

[14.] There are some serious limitations to the effectiveness of this alternative. Sentencing authorities are justifiably concerned about the "Brer Rabbit" defense ('please don't throw me in the briar patch'). It is where an accused specifically requests heavy fines in lieu of a punitive discharge, knowing that he will be unable to pay the fines and later attempt to discharge them in bankruptcy, thus avoiding both the punitive discharge *and* the fine. Additionally, arguing for a fine in lieu of punitive discharge usually reduces the entire sentencing exercise to a financial exercise, largely ignoring the principles of sentencing, and creating the appearance of the accused trying to "buy" his way out of punishment. For obvious reasons, this strategy is not often pursued.

[15.] See generally M.C.M., Appendix 12 (Maximum Punishment Table). Note that all UMCJ offenses carry confinement as an authorized punishment, ranging from a low of one-month (e.g., simple disorder, short AWOL) to mandatory life (Article 118(1)).

[16.] See *Criminal Law*, Second Edition, Wade & LaFave, (1986), Section 1.5(a)(2). ("If the criminal is imprisoned, he cannot commit further crimes against society.").

[17.] M.C.M. Appendix 12.

[18.] Reprimand: R.C.M. 1003(b)(1). No Punishment: R.C.M. 1002.

[19.] Usually, sentences of no punishment are reserved for situations when an accused's sentence is overturned on appeal and the appellate court orders a rehearing on sentencing. Recall that the courts of criminal appeal have the authority to reassess sentence (R.C.M. 1203) or order a rehearing on sentence. If the convening authority determines that a rehearing on sentence is impracticable, he can avoid the rehearing and approve a sentence to no punishment.

[20.] R.C.M. 1003(b)(9)(A) (dismissal); R.C.M. 1003(b)(9)(B) (dishonorable discharge); and R.C.M. 1003(b)(9)(C) (Bad conduct discharge).

[21.] *Id.* Note that the only discharge cadets and officers may receive is a dismissal; the only discharge warrant officers may receive is a dishonorable discharge. R.C.M. 1003(b)(9)(B).

[22.] According to the DA Pamphlet 27-9, the Judge's Benchbook,

"A Dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct, even though such bad conduct may not include the commission of serious offenses of a military or civil nature."

DA Pamphlet 27-9, Chapter 2, page 70.

Notes

[23.] Note that in the case of an enlisted member at a SPCM, as few as two members could terminate his entitlement to retirement pay. See UCMJ Article 19, 10 U.S.C. §819; and UCMJ Article 16, 10 U.S.C. §816(2)(A).

[24.] A court-martial may not adjudge an administrative separation from the service. R.C.M. 1003(b)(9). Punitive discharges are discharges, which constitute punishment, whereas administrative discharges are administrative in nature and are not designed to punish a member. Of course, administrative discharges are usually characterized (entry-level separations for individuals with less than 180 days in service are not characterized), and the type of characterization (Honorable, General Under Honorable Conditions, and Under Other Than Honorable Conditions) may have certain collateral consequences to the member receiving them. See AFI 36-3208, paragraph 1.18 for more information on administrative discharge characterization.

[25.] See generally *United States v. Queisinberry*, 12 USCMA 609, 31 CMR 195, 198 (1962), and *United States v. Griffen*, 25 M.J. 423 (CMA), cert. denied 487 U.S. 1206, 108 S.Ct. 2849, 101 L.Ed.2d 886 (1988).

[26.] *Id.*

[27.] *Id.*

[28.] See *United States v. Henderson*, 29 M.J. 221 (CMA 1989); *Sumrall*, 45 M.J. 207 (CMA 1996); *United States v. Greaves*, 46 M.J. 133 (1997); and *United States v. Becker*, 46 M.J. 141 (1997).

[29.] 29 M.J. 221 (CMA 1989).

[30.] See *Greaves*, 46 M.J. 133; *Becker*, 46 M.J. 141, and *United States v. Hall*, 46 M.J. 145 (1997).

[31.] *Id.*

[32.] *Greaves*, 46 M.J. at 139, note 1.

Chapter 5

Good Order and Discipline and the PD&R

> *Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.*
>
> —George Washington, 1759

Now, having an understanding of the realities of the system, it is time to consider the impact the PD&R might have on the military justice system's ability to maintain and preserve good order and discipline. The maintenance of good order and discipline is both the foundation of the military and the foundation of the military justice system.[1] No change in the system would be acceptable if it had an adverse impact on good order and discipline. I will address the PD & R's potential impact on good order and discipline by examining how it might affect the five principles of sentencing.

The PD&R discharge would probably enhance rehabilitation of the wrongdoer by providing greater flexibility to craft a sentence which appropriately punishes the member yet also leaves room for a meaningful opportunity for rehabilitation. It would eliminate concerns over a "too limited" menu of punishments for the military sentencing authority to draw from. Judge Sullivan's proposal would bridge the sometimes-wide gap between authorized punishments that are too weak and those that are too harsh. Having said that, it is somewhat inapposite to consider a punitive discharge as having a rehabilitative

purpose; it does not. It is principally imposed as means of retribution and deterrence, two other principles of sentencing.

> The punitive discharge was designed to sever a service-member from the military community and to put a mark upon him, which would make it difficult for him to reenter the civilian society and economy. The punitive discharge thus had two effects by design: first, it punished by ejection from a familiar society and by imposing social and economic hardships; and second, it deterred others by its visible, swift, effective, and harsh character.[2]

Is the PD&R an effort to make the punitive discharge something it is not—a rehabilitative punishment? It depends upon your point of view. One could argue that the simple answer is yes; that allowing a punitively discharged member to draw retired pay significantly alters the effect of a punitive discharge. Recall though, that the forfeiture of retirement pays is a collateral consequence of a punitive discharge; it is not the purpose of a punitive discharge. Since the forfeiture of retirement pay is collateral to the punishment, elimination of a particular collateral consequence does not alter the essential nature of the punishment. The member would still receive a punitive discharge and he would still be separated from the military with the attendant loss of all honors, privileges, and benefits commonly associated with military service, save a monthly retirement paycheck. The provisions of 38 U.S.C. 5303 would remain in effect, terminating punitively discharged members' rights to any veteran's benefits.[3] Additionally, the social and economic hurdles commonly associated with a punitive discharge would remain in effect.[4] Thus, while the payment of retirement pay may mitigate the harshness of a punitive discharge, it does not fundamentally alter the nature of a punitive discharge.

The second principle of punishment is retribution, or "punishment for punishment's sake." This is a legitimate purpose of punishment; a sanction for having done wrong, even when one's offense is "victimless." This is society's way of balancing the books,

and serving the punishment imposed is the wrongdoer's means of paying his debt to society.[5] As alluded to above, this principle of punishment is nearly the mirror image of "rehabilitation," although most people would agree that the process of paying one's debt to society may itself have rehabilitative benefits.[6] Whether the PD&R discharge would have an effect on this area is largely going to depend on whether the sentencing authority wisely uses the new flexibility of the PD&R discharge.

In other words, if an accused receives a punitive discharge with retirement pay when he should instead receive a traditional punitive discharge, the retributional aspect of punishment will be diminished.[7] Conversely, punishments based on excess retribution could diminish respect for the military justice system. In the absence of the PD&R, retirement-eligible accused's receive both the stigma of a punitive discharge *and* the forfeiture of their retirement pay. Such a serious "double-whammy" ought to be reserved for the very worst offenders, and not be a mere "collateral consequence."[8] Viewed thusly, the PD&R could enhance the retribution power of punishment, by allowing for the stratification of punishments. Instead of a "one-size-fits-all" punitive discharge, the sentencing authority could pare and tailor an appropriate punishment, far enhancing the retributional character of the traditional punitive discharge.

The third sentencing principle, protection of society from the wrongdoer, is not really applicable to punitive discharges in general, if for no reason other than the very purpose of a punitive discharge is to send a military member back into society. This principle of punishment is normally accomplished through confinement.

The fourth principle of punishment combines two sides of the same coin, deterrence. One side of the coin is what is termed "specific deterrence;" the notion that the

punishment imposed will teach *this* accused a lesson, and make *this* accused less likely to engage in future misconduct. On the other side of the coin is "general deterrence;" the notion that this accused's punishment serves to teach everyone a lesson[9]; and society's knowledge that wrongdoers are punished will act to deter others who know of the accused's punishment from committing the same or similar crime.[10] One may argue the PD&R would reduce the deterrent effect of the military justice system by potentially lowering the "cost" of engaging in misconduct. Just as military members pending promotion are under de facto probation (the ease of "red-lining" a promotion makes promotion-selected members particularly averse to misconduct),[11] so too should one's approaching retirement induce an increased sense of aversion toward engaging in misconduct. There are several answers to this. First, the addition of the PD&R discharge as an authorized punishment is no guarantee that an accused will receive it. Traditional punitive discharges with the associated loss of retired pay would still be available to the sentencing authorities. Second, while draconian punishment may deter future misconduct,[12] such a concept is at odds with modern notions of fairness and justice. Even more interesting is to examine the actual nature of deterrence. True deterrence is based on a combination of the likelihood of getting caught for a particular act of misconduct, weighted by the severity of the punishment the member is likely to receive.[13] Reducing deterrence to a mathematical formula leads to the observation that any mitigation in potential punishment could be offset through stricter enforcement, a distinct possibility if the PD&R proposal is implemented. Currently, there may be a hesitancy to bring retirement-eligible members to a court-martial specifically because of the distinct possibility that trial may result in them forfeiting their retirement pay.[14] To the extent

this is true, retirement-eligible members may actually benefit at the margin from the perceived harshness of the current system. If the system were modified such that a punitive discharge would not automatically result in forfeiture of retirement pay, commanders and convening authorities might actually send more retirement-eligible members to trial. Therefore, the actual effect the PD&R would have on deterrence is unknown, but the PD&R would not necessarily reduce deterrence in the military.

The final justification for punishment in the military is to preserve good order and discipline.[15] Although this principle of sentencing is not defined by the military judge like the other principles, it most likely is based on a combination of the factors previously discussed, as well as some other considerations I would like to explore in more detail. One possible aspect of the preservation of good order and discipline would be whether the sentence adjudged engenders respect for the "system." The military justice system is an integral part of the process for maintaining discipline in the armed forces, and it is essential that both those subject to it, and society as a whole, have confidence in its fairness and its procedures.[16] To this end, the law and its sanctions should apply equally to all members, regardless of rank, status, or longevity in service. As a general principal, that notion is laudable. However, even in the current military justice system, significant differences are built into the system. Officers cannot be reduced in rank nor be subjected to hard labor without confinement;[17] the military inexperience of junior members is frequently a matter in mitigation,[18] members with lengthy service undergo additional reviews before they are administratively discharged, .[19] and there are instances where senior members are treated differently from junior members.[20] It is not an alien concept for different members of the service to be treated differently.[21]

A close examination of the circumstances also reveal that the PD&R may not be the "windfall" benefit for retirement-eligible members that may be assumed at first blush, but rather a means to equalize punishments where the only differentiation between members is their time in service. Recall the situation of Lt Col Hardwick. Now consider a captain, with the identical fact pattern as Lt Col Hardwick's, except that the captain has five years in service. Theoretically, the same offense was committed,[22] and the same punishment ought to be meted out in both cases. However, if both the Capt and the Lt Col receive ostensibly the same punishment, say a reprimand and a Dismissal, the impact of the punishment is decidedly different on the two parties. The captain forfeits a rather tenuous future expectancy of retirement pay difficult to calculate; the Lt Col forfeits an actuarially determinable sum of money approaching $900,000. Clearly, this is not the same punishment for the same offense. Additionally, to the extent one views the Lt Col's rank to be a matter in aggravation, that is justifiable only if the amount of aggravation is worth the differential punishment, or $900,000. To the extent that the aggravating value of the Lt Col's rank is $900,000, then the sentencing authority is free to impose the punishment of Dismissal with loss of retirement pay. On the other hand, if the sentencing authority views the two cases to be roughly equivalent, the PD&R would now permit roughly equivalent punishment—Dismissal for the captain, and Dismissal with retirement pay for the Lt Col. Therefore, by providing the sentencing authority with a middle position, the system can be rendered fairer, even if only at the margin, by the adoption of the PD&R proposal. To the extent the system is viewed as being fairer that perception will have a positive impact on the maintenance of good order and discipline.

A second area to explore is the effect of a punitive discharge and loss of retirement pay on "innocent" third parties. "Innocent" third parties are individuals who rely on the accused's retirement pay, and were either victims of the crime which led to trial, or who had no role at all in the accused's misconduct. Currently, if an accused commits a crime against his family and is punitively discharged as a result, the family would be entitled to transition compensation payments to compensate for the loss of the accused's income.[23] While a noble concept, the administration of the program in practice has some serious flaws. First, victims are only entitled to very limited benefits.[24] If the PD&R were implemented, family member victims could be in a better financial position vice the current transitional compensation scheme.[25] Second, if the family were to divorce the member,[26] the member's retirement pay would be subject to division by the divorce court as a marital asset, and the family victims would receive payments either for the life of the retiree or the spouse, if the Survivor's Benefit Plan was elected.[27] Third, if the family were to remain intact, then the accused would be able to provide them reasonable and adequate support through his military retirement, and the family would not suffer victim-hood twice.[28] Even more compelling is the circumstance when the accused's family had no part in his criminal behavior, yet they would be the ones to suffer most if he were to forfeit his retirement pay. Consider a case of a retirement-eligible member smoking marijuana. Clearly, that is inexcusable misconduct in this day and age, and the accused definitely deserves punishment. However, should that punishment extend to his family? Because no family member was a direct victim of the misconduct, the family is ineligible for transition compensation payments.[29] Reconsider the hypothetical case of Lt Col Hardwick and substitute marijuana abuse as the charge. His children may be unable to

attend college, and his family's hopes and dreams will be forever altered. However, there are two compelling arguments against this concern: First, the prospect of the family losing everything because of the accused's misconduct serves as a very powerful deterrent to misconduct. It requires an accused to consider how his actions will hurt not only himself but those close to him, and these considerations may well have a chilling effect on his propensity to engage in criminal behavior. Second, military benefits, including retirement pay, are not a form of substitute welfare. If the family does indeed become indigent as a result of the loss of the accused's pay, then there are existing programs in society to assist the family.[30] The Department of Defense should not have to fund in-kind welfare for unfortunate dependents.

Whenever there are two very good arguments concerning an issue, and each argument is the diametrical opposite of the other, the decision goes to the side, which promises the greatest benefits for society as a whole. Because society has an interest in identifying and punishing wrongdoers, it wants "innocent" families to report misconduct. However, when the reporting of misconduct may cost the family money, the family will be less likely to report the misconduct. Society (and especially the military) has an interest in removing these financial barriers to reporting misconduct. In the hypothetical case of Lt Col Hardwick, society (at least the Air Force) would be better served if Mrs. Hardwick were to discover her husband's misconduct and report it to the authorities. However, to the extent there are incentives against her reporting it, she will be less likely to do so. While some of her considerations are beyond the scope of the Air Force's influence (her relationship with her husband and her desires to maintain the family unit), the Air Force can act to allay her financial concerns. This would be a win-win situation

for both the Air Force and the family, and can be achieved (at least in part) by implementing the PD&R. The possibility of retaining retirement pay in the event of a punitive discharge may encourage some families to report misconduct they otherwise would not. Although the transitional compensation statutes address some of these concerns, I have demonstrated that this proposal is more generous than the current program, lowering financial-based resistance to reporting misconduct. Additionally, the transition compensation statutes do not compensate individuals for reporting offenses unless they are the victims. The PD&R discharge will enable family members not personally victimized by the member's misconduct to report it on behalf of a third-party victim and still retain the possibility of not losing their financial security.

The PD&R should have a positive impact on good order and discipline, and may even benefit law enforcement. The PD&R does not fundamentally alter the present military justice system, but creates some incentives and eliminates some disincentives built into the current system. The enhanced flexibility sentencing authorities will have should increase respect for the system, and enhance the impact of the theoretical justifications for punishment. While it is difficult to accurately predict how a complex and dynamic system will respond to change, it seems that adoption of the PD&R will create a net benefit to the military justice system. The final consideration of the appropriateness of the PD&R lies determining what effect it will have on the nature and character of military retirement. While those considerations may not be as pressing as good order and discipline, military retirement is one the military's most important programs. The next section of my paper will address those concerns.

Notes

[1.] The preamble to the Manual for Courts-Martial states that "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Part I, MCM, paragraph 3.

[2]. *"A Criminal Punitive Discharge—An Effective Punishment?"*, 79 Mil.Law.Rev. 1, 17, 1978.

[3]. As part of the statutory implementation process for the PD&R, a definition for the PD&R will have to be added to this statute defining the PD&R as a punitive discharge with the same effects on benefits as any other punitive discharge.

[4.] The sentencing instruction refers to the "ineradicable stigma" associated with a punitive discharge. DA Pamphlet 27-9, Chapter 2, page 69 (1996).

[5]. See *Criminal Law*, Second Edition, Wade & LaFave, (1986), Section 1.5(a)(6). ("It is only fitting and just that one who has caused harm to others should himself suffer for it. Additionally, retributive punishment is needed to maintain respect for the law and to suppress acts of private vengeance.").

[6.] *Id.*

[7.] Of course, this is nothing new, and the possibilities (?!) of inappropriate punishments exists under today's system.

[8.] Compare this to the language in AFI 51-202, paragraph 5.4.2, for imposing the Article 15 punishment of both an unsuspended reduction in rank and forfeitures:

"While not prohibited by law, commanders should impose an unsuspended reduction in grade, along with forfeiture of pay, only when the maximum exercise of Article 15 authority is warranted (e.g., repeat offender, most serious offenses, past rehabilitative efforts, or recalcitrant offender)."

[9] "*Men are not hanged for stealing Horses, but that horses may not be stolen*."

—George Savile, 1st Marquees of Halifax, 1633-1695.

[10.] DA Pamphlet 27-9, Chapter 2, p. 64 (1996). The law review literature is very skeptical of the notion of general deterrence. See *Criminal Law*, Second Edition, Wade & LaFave, (1986), Section 1.5(a)(4).

[11.] See AFI 36-2501, Chapter 5, which discusses the procedures for removing an officer or enlisted member from a promotion list (commonly called 'red lining').

[12]. Is this true? Consider medieval times where virtually all felony crimes were punished by death, and trivial offenses resulted in extremely severe punishment. None of these harsh punishments were particularly effective in reducing lawlessness. See generally *Criminal Justice through the Ages*, PP 99-173. .

[13]. See generally *Criminal Law*, Second Edition, Wade & LaFave, (1986), Section 1.5(a)(4).

[14]. In other words, the possibility of a member losing retirement pay may have a chilling effect on a commander's recommendation, causing that commander to recommend non-judicial punishment where he might otherwise have given stronger consideration to a court-martial.

[15.] DA Pamphlet 27-9, Chapter 2, p. 64 (1996).

[16.] Consider the public debate surrounding the cases of 1Lt Kelly Flinn, Command Sergeant Major Eugene McKinney, and others recently in the news.

[17]. R.C.M. 1003(c)(2)(A).

Notes

[18.] See generally DA Pamphlet 27-9, Chapter 2, pp. 71-72. See also *United States v. Wheeler*, 17 C.M.A. 274, 38 C.M.R. 72 (1967) ("Wheeler Factors").

[19]. See AFI 36-3208, paragraph 6.35, which requires lengthy service review for members who have been in the service for 16 years or longer. There is no similar provision for officers, because all officer discharges go the Secretary for action, whereas many enlisted discharges can normally be executed at much lower levels.

[20.] While the perceived inequities of punishment between senior members and junior members has been often criticized, much of the criticism is misplaced. Critics look to the differences in the nature of punishment (junior members receiving Article 15s or confinement; senior members receiving reprimands or fines), but miss the real point: whether the *effect* of the punishments is equivalent. A reprimand to an officer is frequently more severe than an Article 15 to an enlisted member; and a fine imposed on a member with significant assets can be more harsh than confinement imposed on an individual with no means. By considering the effects of the punishment, and not the mere nature of the punishment, one can better judge the actual justice of the system.

[21.] RHIP—Not!?

[22]. Is the Lt Col's rank a matter in aggravation?

[23]. 10 U.S.C. §1959.

[24]. Transitional compensation is covered by AFI 36-3024. It applies only when the military members is separated from the military for dependent abuse. Payments, equal to the amount the spouse would receive under Dependent Indemnity Compensation (DIC) ($769.00 per month for spouse, and $200 per child per month), are paid for the lesser of 36 months or the member's remaining enlistment, but in all cases for not less than 12 months. Payments cease if the spouse either remarries or co-habitates with the member.

[25.] The convening authority could suspend or mitigate elements of the accused's sentence contingent upon the accused establishing an allotment to his family of a certain amount of money. To the extent that the amount of the allotment exceeded the amount available under the Transitional Compensation Statute, the family would be better off.

[26.] The requirement that the spouse receiving payments not cohabitate with the military member either assumes or encourages a divorce.

[27]. In other words, a divorce settlement could give the spouse a property entitlement in the member's retirement pay, which could be subject to division. If the retirement is divided in the divorce, the spouse could collect the retirement pay until the member died, or if the member elected the Survivor's Benefit Pay, then the spouse would collect a portion of the retirement pay for life. Either of these alternatives would probably result in the spouse receiving more money than is currently provided for by the Victim-Witness statutes.

[28.] There may be little sympathy for a family that remains with an accused after he victimized one or more family members. However, it does happen, and moreover, the resulting financial impact even with the transitional compensation benefit is not sufficient to prevent the family from being twice victimized.

[29.] AFI 36-3024, Transitional Compensation Payments, applies only when the family is a direct victim of the accused's misconduct.

[30.] For example, Aid to Families with Dependent Children, Food Stamps, and others.

Chapter 6

The PD&R and the Military Retirement System

> *People in the West have acquired considerable skill in using, interpreting, and manipulating law… Every conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required; nobody may mention that one could still not be entirely right, call for sacrifice, and selfless risk—this would simply sound absurd. Voluntary self-restraint is almost unheard of; everybody strives toward further expansion to the extreme limit of the legal frames…. I have spent all my life under a Communist regime, and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man.*
>
> —Alexander I. Solzenitsyn

The last issue that remains to be addressed concerning the PD&R is to consider its impact upon the military retirement system. I will examine three areas: First, its effect on the role of the Service Secretaries; second, its effect on recall of retirees and collateral military retirement benefits; and finally (and perhaps most importantly), its impact on the pride and status of honorably retired military members.

Recalling our previous analysis of the military retirement system, the Service Secretaries have the discretion to retire military members who have reached 20 years of service.[1] As written, the Secretary has discretion whether or not to retire a member; the reality is that service regulations remove virtually all Secretarial discretion over *whether* a person may be retired, but the Secretary retains discretion to determine *when* a member may be retired.[2] If the PD&R is implemented, it would appear to withdraw from the

Secretary of the Air Force the decision whether to retire a military member. The question to be considered is whether this is such significant issue that the PD&R ought not to be adopted. Presently, the Secretary's discretion is merely the result of federal statutes granting that discretion; Congress retains complete power to modify those statutes restricting that authority. Because the PD&R would require Congressional legislation to be implemented, it is only a minor matter to insert statutory language requiring a service secretary to approve the retirement of a member receiving a PD&R.[3] From a policy standpoint, implementing the PD&R should not have a significant impact on the role played by the Service Secretary. Currently, according to service regulations, the Secretary must retire court-martialed members otherwise eligible for retirement (specifically, members whose approved sentences do not include a punitive discharge).[4] The adoption of the PD&R would merely create a punishment whose effects do not extend to the forfeiture of retirement pay as a consequence.

The next matter to address is the legal status of a PD&R recipient. Admittedly, the PD&R would create an individual of hybrid status—a punitively discharged retiree. The legal nature of military retirement can be divided into two categories: benefits received as a retiree, and obligations owed as a retiree. Normal military retirees are authorized a full range of benefits administered by the Veterans' administration and other government agencies; punitively discharged members are denied all or virtually all such benefits.[5] A BCD adjudged by a Special Court-Martial does not conclusively terminate all such benefits; government agencies make a case-by-case analysis.[6] All punitive discharges adjudged by a general court-martial are sufficient for a government agency to deny benefits without further inquiry.[7] But, benefits that vest by virtue of prior honorable

discharges (usually relevant to enlisted members or prior-enlisted officers) are not affected by a punitive discharge in the current enlistment.[8] Officers without a prior honorable discharge normally forfeit all veterans' benefits upon execution of a punitive discharge.[9] Although the forfeiture of veteran's benefits is a collateral consequence of a punitive discharge, it does not seem unreasonable to deny a punitively discharged member various government benefits usually associated with honorable service. Consequently, I would propose that the member discharged with a PD&R receive none of the government benefits associated with discharges or retirements under honorable conditions. The denial of such benefits and associated status accompanying the receipt of such benefits is consistent with the punitive nature of the PD&R characterization.[10] This includes forfeiture of medical care, BX and commissary privileges, forfeiture of a military identification card, loans administered by the Veteran's Administration, and termination of the right to be buried in a national cemetery, among others.[11] Basically, an individual receiving a PD&R discharge would still be punitively discharged from the service; their only connection with the military is their monthly receipt of retirement pay. They should not be entitled to any of the other honors and privileges associated with military retirement. In addition to the benefits given to military retirees, there are also duties expected of them. Among others, military retirees remain subject to the Uniform Code of Military Justice,[12] and also remain subject to involuntary recall to active duty by order of their Service Secretary.[13] The recipients of a PD&R discharge should have their entire "social" connection to the military terminated. Members receiving a PD&R discharge should not be eligible for recall to active duty, nor should they remain subject

to the UCMJ. Every attempt should be made to view the PD&R discharge as a punitive discharge in every respect save for the receipt of retired pay.

The final matter to address is the impact the PD&R discharge would have on the pride and status of existing (and future) honorably retired military members. On one hand, the obvious concern of honorably retired members is that members who were punitively discharged from the military have forfeited their rights to anything from the military. They may believe that the military's rules are well-known to one and all and compliance with the basics of the criminal law are not too much to expect from commissioned and noncommissioned officers of the military. Simply put, those who violate military standards should not benefit from the military. Of course, all of the foregoing is correct and without debate. The real issue and the real challenge is to accurately and fairly place an individual accused's misconduct along a spectrum from very minor to very serious and determine an appropriate penalty for that misconduct.

Not all offenses warrant total separation from the military environment, just as some offenses fairly cry out for such separation. The PD&R is an option for sentencing authorities, just as sentencing authorities currently have the option to not adjudge a punitive discharge, and convening authorities have the option to disapprove a punitive discharge. The difference with the PD&R though, is that members with an approved punitive discharge will be receiving a military retirement. The implementation of the PD&R will have to be accompanied with detailed explanation that it is intended only for those cases where fairness and justice dictate the compromise that is inherent in the PD&R. If the PD&R is appropriately used, the entire military community should be comfortable with the enhanced fairness and justice it represents.

Additionally, there will be very serious distinctions between members with a traditional honorable retirement and a PD&R retirement. Traditional retirees are welcome on base to participate in the military community and take advantage of a full range of military benefits; PD&R retirees will not be welcome. While traditional retirees remain subject to military recall whereas PD&R retirees will not, the notion that military retirement pay is compensation for such readiness is not supportable under today's retirement scheme. Consequently, traditional retirees should merely view the possibility of recall as a patriotic duty, and not a quid pro quo for receiving retirement pay. If the PD&R is properly implemented with clear distinctions between members honorably retired and those only drawing retirement pay, the pride and honor associated with military retirement should not be unduly diminished.[14]

The status of our military retirees is an important consideration in the decision to adopt the PD&R. However, there is a difference between being a retiree and merely drawing retirement pay. That distinction will have to be emphasized if the PD&R is to be successfully adopted. The other concerns addressed are resolved through legislation; this one will require education and commitment. However, the overall system will be the victor if we are able to improve the administration of military justice. No person gains at another's expense, and the status of military retirees is not improved by perpetuating injustices in the military justice system. Further, since military retirees are themselves subject to the UCMJ, they may ultimately benefit from the PD&R if one of them is unfortunate enough to be court-martialed.[15]

Notes

[1]. 10 U.S.C. §§3911, 3914 (Army); §§ 6323, 6330 (Navy); §§8911, 8914 (Air Force).

Notes

[2.] AFI 36-3203, Chapters 2, 3 (but see Table 3.1—retirements short of 40 years are discretionary).

[3]. See 10 U.S.C. §§3911, 3914, and AFI 36-3203, Table 3.1

[4.] AFI 36-3203, Table 2.2, Rule 17.

[5.] See generally 38 U.S.C. §5303. See also 38 U.S.C. §101(2) and 38 C.F.R. §3.12(a).; 3.12(d)(iii).

[6]. 38 C.F.R. 3.12(a).

[7]. 38 C.F.R. 3.12(b).

[8.] See 38 C.F.R. 3.12 and DA Pamphlet 27-9, Chapter 2, p. 70.

[9.] Unlike enlisted members who are discharged at the end of their enlistment (notwithstanding their simultaneous reenlistment, or even when they reenlist prior to their previous enlistment ending), officers are not discharged during their term of service. Consequently, officers do not obtain a discharge characterization until they leave service (except of course for officers with prior enlisted service).

[10.] To maintain consistency in the administration of benefits, the PD&R discharge ought to be characterized as either a "Bad Conduct Discharge with retirement pay" or Dishonorable Discharge with retirement pay" for enlisted personnel, and as a "Dismissal with retirement pay" for officer members. This will enable government agencies to continue to equate the dishonorable discharge with the dismissal for determining eligibility for benefits, and also continue to enable the current distinction between a BCD adjudged at a SPCM and one adjudged at a GCM for determining benefits for certain enlisted members.

[11.] The list of benefits can go on almost forever. A brief sampling: Right to wear military uniform (10 U.S.C. §771a); Government funeral expense benefits (38 U.S.C. 2302(a)); Burial in a National Cemetery (24 U.S.C. 2402); Dependent and Indemnity Compensation (38 U.S.C. §1310(b)); VA Home Loans (38 U.S.C. §3702(c)); and Civil Service Preference (5 U.S.C. §2108(1)).

[12.] UCMJ Article 2(a)(4); 10 U.S.C. §802(a)(4).

[13]. 10 U.S.C. §688.

[14.] The reality is that we are dealing with a very small population of individuals. Air Force statistics for the past three years are as follows:

1997:5 Retirement-Eligible Officers Court-Martialled; 2 received punitive discharges.

18 Retirement-Eligible Enlisted Members Court-Martialled; 6 received punitive discharges.

1996:9 Retirement Eligible Officers Court-Martialled; 4 received punitive discharges.

25 Retirement-Eligible Enlisted Members Court-Martialled; 11 received punitive discharges.

1995:6 Retirement Eligible Officers Court-Martialled; 2 received punitive discharges.

28 Retirement-Eligible Enlisted Members Court-Martialled; 11 received punitive discharges.

According to these statistics from the Air Force's military justice database, less than 20 retirement-eligible members are punitively discharged each year. However, the small

numbers of retirement-eligible persons affected by punitive discharges does not trivialize the issue; fairness and justice are not measured in the aggregate, but one case at a time.

[15] *See United States v. Hooper*, 9 USCMA 637, 26 CMR 417 (1958). Hooper was a rear admiral who had been retired for nine years when he was court-martialed for homosexual acts, and was sentenced to a dismissal. The companion case, *Hooper v. United States*, 326 F.2d 982 (U.S. Ct. of Claims 1964) established the ratified the collateral consequence that a dismissed member forfeits his retirement pay.

Chapter 7

Conclusion

> *I abhor averages. I like the individual case. A man may have six meals one day and none the next, making an average of three meals per day, but that is not a good way to live.*
>
> —Louis D. Brandeis

The proper administration of military justice requires a delicate balance between the needs of good order and discipline and the needs and rights of the accused. The PD&R discharge would enable the system to make finer distinctions in the sentencing process, enhancing justice and fairness in the armed forces. It will have a positive effect on the maintenance of good order and discipline, and increase respect for the administration of military justice. It may also provide incentives for individuals to report offenses which they would currently have little or no incentive for doing, something which will also enhance the readiness of the force. The PD&R is not inconsistent with the military retirement system in its present evolution. Consequently, I recommend the adoption of the PD&R. This will require congressional legislation to change the retirement system, and an executive order to change the Manual for Courts-Martial. This change is long overdue, and easily remedied. The PD&R is not just for retirement-eligible who engage in misconduct—it is for all members of the armed forces who believe in fairness and justice, and the dignity of the individual.

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10 U.S.C. §3911	Twenty Years or More; Regular or Reserve Commissioned Officers
10 U.S.C. §3914	Twenty to Thirty Years: Enlisted Members
10 U.S.C. §6323	Twenty Years or More; Regular or Reserve Commissioned Officers
10 U S.C. §6330	Twenty to Thirty Years: Enlisted Members
10 U.S.C. §8911	Twenty Years or More: Regular or Reserve Commissioned Officers
10 U.S.C. §8914	Twenty to thirty Years: Enlisted Members
26 U.S.C. §219	Retirement Savings
28 U.S.C. 1259	Court of Appeals for the Armed Forces; Certiorari
38 U.S.C. §101	Definitions
38 U.S.C. §1310	Deaths Entitling Survivors to Dependency and Indemnity Compensation
38 U.S.C. 2302	Funeral Expenses
38 U.S.C. 2402	Persons Eligible for Interment in National Cemeteries
38 U.S.C. §3702	Basic Entitlement
38 U.S.C. §5303	Certain Bars to Benefits

Manual for Courts-Martial

M.C.M. Part I	*Preamble*
M.C.M. Part V	*Non-judicial Punishment Procedure*
M.C.M., Appendix 12	*Maximum Punishment Table*

Uniform Code of Military Justice

UCMJ Article 2	Persons Subject to this Chapter
UCMJ Article 15	Commanding Officer's Non-judicial Punishment
UCMJ Article 16	Courts-Martial Classified
UCMJ Article 19	Jurisdiction of Special Courts-Martial
UCMJ Article 22	Who May Convene General Courts-Martial
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UCMJ Article 30	Charges and Specifications
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UCMJ Article 60	Action by the Convening Authority

UCMJ Article 66	Review by Court of Criminal Appeals
UCMJ Article 67a	Review by the Supreme Court
UCMJ Article 71	Execution of Sentence; Suspension of Sentence
UCMJ Article 118	Murder

Rules for Court-Martial

R.C.M. 306	Initial Disposition
R.C.M. 307	Preferral of Charges
R.C.M. 405	Pretrial Investigation
R.C.M. 705	Pretrial Agreements
R.C.M. 1001	Pre-sentencing Procedure
R.C.M. 1002	Sentence Determination
R.C.M. 1003	Punishments
R.C.M. 1105	Matters Submitted by the Accused
R.C.M. 1107	Action by the Convening Authority
R.C.M. 1113	Execution of Sentences
R.C.M. 1203	Review by a Court of Criminal Appeals

Regulations

Federal Regulations

38 C.F.R. 3.12	Character of Discharge

Air Force Regulations

AFI 36-2501	Officer Promotion and Selective Continuation
AFI 36-2608	Personnel Files
AFI 36-2608	Unfavorable Information Files (UIF)
AFI 36-3024	Transitional Compensation for Abused Dependents
AFI 36-3203	Service Retirements
AFI 36-3207	Separating Commissioned Officers
AFI 36-3208	Administrative Separation of Airmen
AFI 51-201	Administration of Military Justice
AFI 51-202	Administration of Non-judicial Punishment

Army Publications

DA Pamphlet 27-9	The Judge's Benchbook

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Criminal Justice Through the Ages, Christoph Hinckeldey, Editor (1981)
Criminal Law, Second Edition, Wade & LaFave, (1986)
Military Criminal Justice, 4th Edition, David A. Schleuter (1996).
Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 Mil.L.Rev. 1 (1978)

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